IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 163 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA.

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

HASUMATI P GOHEL

Versus

BAVSAR TRIBHOVANDAS RATILAL

Appearance:

MR SURESH M SHAH for Petitioner

CORAM : MR.JUSTICE R.BALIA.

Date of decision: 12/09/97

ORAL JUDGEMENT

This is the defendant's Second Appeal against judgment and decree passed by the learned Assistant Judge, Bhavnagar on 11.8.97 by confirming the judgment and decree passed by the learned Civil Judge (S.D.), Bhavnagar dated 21.3.1995 decreeing plaintiff's suit for possession of the suit premises which is situated at Bhavnagar.

2. It has been first contended by the learned counsel for the appellant that the suit was exclusively triable by the Rent Court under the provisions of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (Hereinafter called as the Act) in view of section 28 thereof which arises for consideration in this Appeal as the substantial question of law.

3. As it would be seen presently, that though the question raised by the appellant is a question of law, as it stands concluded against him by the decision of the Supreme Court, it cannot be considered a substantial question of law for the present purposes.

4. The plaintiff has filed the suit for taking possession of the suit property owned by him on the ground that the defendant is a trespasser. According to the averments made in the plaint, out of three houses owned by the plaintiff, the first floor portion of house no. 396/1 and 396/2 was rented to one Godavariben Jeevansing at monthly rent of Rs. 9/-, that since last about 2 to 2.1/2 years prior to the filing of the suit. She has kept the house closed and gone away to Jamnagar where she died on 15.6.86. Said deceased tenant was unmarried and a person named Badshah was maintaining her. The present defendant whose father was carpenter and mother was belonging to caste of Barber. After the death of Godavariben, she had come to her house for taking away household kits etc. from the aforesaid premises, and thereafter she continued to stay in the house without any tenancy rights or any other right whatsoever. The deceased Godavariben had no issue and no near relatives. The defendant in her written statement denied the plaintiff's averments as to trespass and the fact of deceased Godavariben going away to Jamnagar after locking house. She asserted that she was residing with the deceased from the beginning as her daughter as Godavariben had no heir, the defendant had continued to stay in the premises alongwith her husband even after her marriage and she claimed her status as a tenant after death of Godavariben and her right to continue as such. Both the Courts concurrently found after referring to evidence that the case set out by the defendant is not credible. The assertion that the defendant is residing in the suit premises since long was not acceptable. It was also found that she has failed to prove that she was residing with the deceased at the time of her death. As to relationship, it was admitted before the lower appellate court that the defendant is not the daughter of

the deceased tenant, but her case is that she was treated by the deceased as her daughter.

5. On the premise of defence of existing tenancy taken in the written statement, the plea of jurisdiction of the Civil Court under section 9 of the Civil Procedure Code to entertain the suit was also raised, but the same has been rejected.

6. In the case of Raizada Topandas vs. M/s. Gorakhram Gokaldas reported in AIR 1964, SC,1348 the question had arisen about the scope and ambit of section 28 of the Act with which we are concerned. In the said case, the plaintiffs had instituted the suit in the City Civil Court, Bombay asking for a declaration that the defendants were not entitled to enter into or remain in possession of a certain shop in Greater Bombay and for a permanent injunction restraining them from entering the shop. The allegations on which the claim to these reliefs was based were that the defendants had been granted a licence to use the shop of which the plaintiffs were the tenants under the owner and that defendants were wrongfully continuing in possession inspite of the termination of the licence and were thereby preventing the plaintiffs from carrying on their business at the shop. The defence to the suit was that the relationship between the parties was not that of licensor and licensee but that the shop had in fact been sub-let to them and that the agreement between the parties had been given the form of a licence only as a cloak to protect the plaintiffs from ejectment under the Rent Act by its landlord on the ground of unlawful subletting. The defendants contended that as they were really tenants of the plaintiff and he was not entitled to remove them from possession in view of the provisions of the rent Act by its landlord on the ground of unlawful possession. With aforesaid pleadings in defence, plea as to want of jurisdiction of City Civil Court, Bombay under section 28(1) of the Act, as in the present case, was raised. The Court in its leading judgment approved the ratio of the Full Bench decision of Allahabad High Court in Ananti vs. Chennu AIR 1930 Allahabad,193 that :

> "the plaintiff chooses his forum and files his suit. If he establishes the correctness of his facts he will get his relief from the forum chosen. If he frames his suit in a manner not warranted by the facts, and goes for his relief to a court which cannot grant him relief on the true facts, he will have his suit dismissed. Then there will be no question of returning the

plaint for presentation to the proper court, for the plaint, as framed, would not justify other kind of court to grant him the relief. If it is found, on a trial on the merits so far as this issue of jurisdiction goes, that the facts alleged by the plaintiff are not true and the facts alleged by the defendants, are true and that the case is not cognizable by the court, there will be two kinds of orders to be passed. If the jurisdiction is only one relating to territorial limits or pecuniary limits, the plaint will be ordered to be returned for presentation to the proper court. If, on the other hand, it is found that having regard to the nature of the suit, it is not cognizable by the class of court to which the court belongs, the plaintiff's suit will have to be dismissed in its entirety."

The Supreme Court further went on to hold :

" The argument of learned counsel for the appellant is that the section in effect states that notwithstanding any general principle, all claims or questions under the Act shall be tried exclusively by the courts mentioned in the section, e.g. the Court of Small Causes in Greater Bombay and it does not matter whether the claim or question is raised by the plaintiff or the defendant. The argument is plausible, but appears to us to be untenable on a careful scrutiny. We do not think that the section says or intends to say that the plea of the defendant will determine or change the forum. It proceeds on the basis that exclusive jurisdiction is conferred on certain courts to decide all questions or claims under the Act as to parties, between whom there is or was a relationship of landlord and tenant. It does not invest those courts with exclusive power to try questions of title, such as questions as between the rightful owner and a trespasser or a licensee, for such questions do not arise under the Act. If therefore, the plaintiff in his plaint does not admit a relation which would attract any of the provisions of the Act on which the exclusive jurisdiction given under Section 28 depends, the defendant by his plea cannot force the plaintiff to go to a forum where on his averments he cannot go."

7. From the aforesaid decision, it is clear

that the question of exclusive jurisdiction under section 28(1) does not depend upon the plea raised by the defendant, but on the averments made in the plaint. It is true that mere form of relief claimed is not conclusive of the real disputes and that has to be gathered from the reading of the plaint as a whole. It is the nature of the dispute raised in the plaint that determines the question of jurisdiction and not in the defence.

8. The ratio of the aforesaid decision fully governs the present case. The plaintiff in his plaint has nowhere averred or founded the relief of possession from the defendant to arise out of any existing relationship between, them as a landlord or tenant. He has pleaded the defendant to be a rank trespasser being a stranger to deceased tenant. The fact that the defendant has denied her status as a stranger and pleaded facts constituting her status as a tenant under section 5(11)(c) would not govern the case to be exclusively triable under section 28(1) by the Tribunals constituted thereunder.

9. The learned counsel for the appellant strongly urged that the case is squarely governed by the ratio in this Court in the case of Nafisaben vs. John Alias Zenub report in 1981(22) GLR, 674 wherein a stay for recovery of possession as trespasser from the defendants was held to be triable exclusively by the Court of Small Causes under section 28(1) of the Rent Act.

10. Having carefully considered the said decision and the ratio laid therein, I am of the view that the facts of the said case were clearly distinguishable and has no application to the facts of the present case. It was a case in which the plaintiff had filed a Regular Civil Suit against daughters of the statutory tenants alleging them to be trespassers by making averments that they were not residing at the time of death of the tenant with him. After Regular Suit had been filed in December 1972, but when the Court of Small Causes was set up at Surat alongwith other matters under Bombay Rent Act, the suit was transferred to the newly established Small Causes Court and suit was renumbered as such. No objection to the transfer of Regular Suit to the Small Causes Court under Rent Control Act was raised by the plaintiff then. When the suit was dismissed by the Small Causes Court, no such contention regarding lack of jurisdiction of the Court of Small Causes was raised in the memo of appeal filed by the plaintiff before the learned District Judge and the plaintiff allowed the trial to proceed before the

Tribunal under the Rent Act. It was only during the course of hearing of appeal that plea as to jurisdiction was raised before the learned District Judge which was upheld. It was under these circumstances that the matter had come up before this Court in Revision Application filed by the defendant. The conclusion to which the Court reached are recorded as under:

(1) that the Court of Small Causes was the only Court which could have decided the question whether the rights of the deceased Sakinabu in respect of the suit premises were heritable or not and if they were heritable, whether they were inherited by any of the defendants in the suit and it was for the Court of Small Causes to decide the further question whether the defendants were protected by the definition of "tenant" occurring in section 5(11)(c) of the Act.

(2) My further conclusion is that even if I am wrong on this part of the judgment, in any event, the plaintiff must be deemed to have waived the objection as to jurisdiction and that having taken the chance of getting a decree in his favour is now precluded from contending that the Court of Small Causes at Surat had no jurisdiction to try this suit.

11. At the outset it may be noticed that the fact that the defendant was the daughter of the deceased tenant and was a heir under general law, was eminating from the plaint. The defendant was alleged to be a trespasser on the ground that the deceased being a statutory tenant, rights of tenancy were not heritable and the defendant, though being a member of the family, did not fulfil a condition of section 5(11)(c) to be treated as a tenant and therefore, her status is to be treated as a trespasser. Thus, pleading in the plaint gave rise to the issue relating to heritable nature of tenancy held by the deceased tenant by denying heritability of the existing statutory tenancy albeit heritability under general law was not disputed, existence of statutory tenancy was admitted. Relationship of defendants as heir was admitted. Question of law whether on these admitted facts, such tenancy was inherited by defendants who are heirs under law of inheritance or came to an end arose from the pleadings in the plaint and not from plea in written stastement. Defendants being members of family of

deceased tenant also was an admitted fact in plaint and fulfilment or the non-fulfilment of the conditions requisite for making such member of the family tenant under section 5(11)(c) also arose directly from plaint. The issue to that effect did not arise from the plea of the defendants. It is by adverting to the pleadings in plaint that learned Judge while distinguishing the decision of the Supreme Court in Raijada Topandas had observed :

"Though the frame of the suit was on the basis that the defendants were trespassers and though it was the plaintiff's case in the plaint that the defendants were trespassers and he would claim possession of the suit premises as if they were trespassers, the facts averred in the plaint indicate that whichever was the Court which tried the suit, it would have jurisdiction t o decide the question of section 5(11)(c) of the Act because in the plaint it was alleged that the deceased tenant had no son and the defendants had come to the suit premises only in connection with the obsequial ceremonies in connection with the death of tenant. In anticipation of the plea tht might be raised by the defendants that they were tenants within the meaning of section 5(11)(c) of the Act, the owner of the property, the plaintiff, was averring in the plaint that statutory tenancy was not heritable and secondly that none of the defendants was residing with deceased tenant at the time of her death."

It is on the basis of these pleadings in plaint that the question which was considered of primary relevance was whether tenancy rights were inheritable or not and whether they were inherited by any of the defendants in the suit. Apart from the above distinction the decision was independently founded on conclusion no.2, by holding that plaintiff was estopped from challenging the jurisdiction of Small Cause Court, which in fact had tried the suit, he having not objected to its jurisdiction at earliest opportunity. It was dealing with a converse case. The question as to facts of suit, had it been decided as regular suit by court of ordinary jurisdiction was neither raised nor decided.

The averments in the plaint clearly made the case distinguishable even on the principles emanating from the ratio in Topandas's case. Chagla, C..J in Govindram Salamatrai, AIR 1951 Bombay, 390 had said :

" There can be no doubt that when a plaintiff files a suit against a defendant alleging that he is his licensee, it is a suit which cannot be entertained and tried by the Small Caluses Court because it is not a suit between a landlord and a tenant, and judging by the plaint no question arises out of Rent Control Act or any of its provisions which would have to be determined on the plaint as it stands.....it cannot be suggested that.....the initial jurisdiction which the Court had or which the Court lacked should be controlled or affected by any subsequent contention that might be taken up by the defendant.....The jurisdiction of a Court is normally and ordinarily to be determined at the time of the inception of a suit. Therefore when a party puts a plaint on file, it is the time that the Court has to consider whether the Court had jurisdiction to entertain and try that suit or not."

The Apex Court after quoting above opinion of Chagla, CJ with approval said in order to decide whether the suit comes within the purview of section 28 or not what must be considered is what the suit as framed in substance is and what the relief claimed therein is. If the suit as framed is by a landlord or a tenant and the relief asked for is in the nature of claim which arises out of the Act or any of its provisions, then only and not otherwise will it be covered by section 28.

12. Thus, in each case, it would depend on construction of averments made in the plaint whether relief claimed is essentially founded and to be determined on issues relating to any claim or the question arising out of the Rent Act or any such provisions and not otherwise. For the purpose of determining the question of jurisdiction, what plea has been raised in defence cannot be relevant and determining factor.

13. Learned counsel lastly urged that findings of the Courts below are vitiated inasmuch as they have not drawn correct inferences from the documentary evidence and the evidence led by the defence as to his claim has been rejected erroneously. It was urged that Court having accepted the factual data contained in the documentary evidence, the inferences drawn from such data are not correct.

14. It is now well settled that inferences from other proved facts, themselves are findings of facts and do not give rise to a question of law. In the case of Sree Meenaakshi Mills Ltd. vs. Commissioner of Income-tax, reported in AIR 1957, SC,49, the Supreme Court while considering what a question of law means, set a proposition that an inference from facts is one of law will be correct in its application to mixed questions of law and fact but not to pure questions of fact. Thus, where ultimate conclusion which is to be drawn is a question of fact and inference drawn from proved facts for reaching such conclusions is also a question of fact and does not give rise to any question of law, unless such finding of fact can be said to be vitiated on permissible grounds. Normally where such finding has been reached without any evidence or it has been based partly on relevant and partly on irrelevant consideration or on partly admissible and partly inadmissible evidence, the same are vitiated and not binding on appellate Court and do raise question of law.

15. Having considered the contentions of the learned counsel and perused the judgment, record and findings, I am of the opinion that the findings have been arrived at after proper appreciation of material which has come before the Court with cogent reasons. Not relying upon the evidence led by the defendant in support of her plea for reaching the conclusion not agreeing with it that the defendant was residing for long with the deceased tenant as her relative in the suit premises, the intermittent residence or residing with the tenant at some times in past did not arouse the confidence of the courts below to uphold the contention of the defendant's long residence with the deceased tenant in order to sustain her claim, by pointing out various infirmities and surrounding circumstances, affecting the credibility of that contention. The findings of facts arrived at by Courts below do not suffer from any such infirmity warranting interference. As the very foundation of defendant's claim by establishing facts making her come within the purview of section 5(11)(c) has not been established, further question raised by the learned counsel that for the purpose of section 5(11)(c) expression "member of family" need not be construed to be a blood relation but related to any person residing with the deceased tenant who was treated by the deceased as member of his or her family, would bring her case within the purview of section 5(121)(c) of the Act need not be examined.

16. I find no force in this appeal. The same

is hereby dismissed summarily.

Learned counsel for the appellant wants that execution of the decree under appeal may be stayed for some time in order to enable the appellant to file an appeal before the Supreme Court. The prayer is refused.

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